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COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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No. PD-1042-18

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

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COURT OF CRIMINAL APPEALS
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DEANA WILLIAMSON, CLERK

RUBEN LEE ALLEN
Appellant
v.

THE STATE OF TEXAS
Appellee

On Petition for Discretionary Review from
Appeal No. 01-16-00768-CR
in the Court of Appeals, First District at Houston

Trial Court Cause No. 1487627
337th District Court of Harris County, Texas
Hon. Renee Magee, Judge Presiding

APPELLANT'S BRIEF ON THE MERITS REGARDING APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

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ORAL ARGUMENT NOT REQUESTED

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PRESIDING JUDGE:	Hon. Renee Magee 337th District Court Harris County, Texas 201 Caroline, 11th Floor Houston, Texas 77002

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STATEMENT OF THE CASE

On December 16, 2015, a Harris County grand jury returned an indictment charging the Appellant with the felony offense of aggravated robbery with a deadly weapon alleged to have occurred on or about September 11, 2015. (1 C.R. at 22). On September 15, 2016, a jury found the Appellant guilty of the offense of aggravated robbery. (1 C.R. at 125-126; 5 R.R. at 35). On September 16, 2016, the jury assessed Appellant's punishment at 25 years' confinement in the Texas Department of Criminal Justice – Institutional Division. (1 C.R. at 125-126; 7 R.R. at 186). No motion for new trial was filed. Appellant timely filed his notice of appeal on September 20, 2016 and the trial court certified the Appellant's right to appeal. (1 C.R. at 128-131).

On direct appeal, the First Court of Appeals initially affirmed the judgment of the trial court, but held TEX. CODE OF CRIM. PROC. ART. 102.011(a)(3) and (b) violated the State Constitution's Separation of Powers clause and modified the judgment to delete the $200.00 court cost for "summoning witness/mileage" assessed against the Appellant. *Allen v. State*, No. 01-16-00768-CR, 2017 Tex. App. LEXIS 11015 (Tex. App.—Houston [1st Dist.] Nov. 28, 2017). The State then filed a timely motion for *en banc* reconsideration on December 7, 2017. The panel withdrew the initial opinion on June 12, 2018, and issued a new, published opinion on August 30, 2018, affirming the judgment of the trial court, rejecting Appellant's constitutional

challenge to the summoning witness/mileage fee. *Allen v. State*, No. 01-16-00768-CR, 2018 Tex. App. LEXIS 7216 (Tex. App.—Houston [1st Dist.] Aug. 30, 2018, pet. granted) (op. on reh'g) (designated for publication). Justice Jennings authored a published dissent. *Id.* at *25 (Jennings, J., dissenting). On December 12, 2018, this Court granted the Appellant's petition for discretionary review, as well as the State's cross-petition for discretionary review.

STATEMENT REGARDING ORAL ARGUMENT

This Court has ordered that oral argument will not be permitted in this case.

ISSUE PRESENTED

Whether the First Court of Appeals erred when it misinterpreted *Peraza v. State*, 467 S.W.3d 508 (Tex. Crim. App. 2015) and failed to apply *Salinas v. State*, 523 S.W.3d 103 (Tex. Crim. App. 2017) in determining that the summoning witness/mileage fee under Texas Code of Criminal Procedure Article 102.011 was not facially unconstitutional because the court cost was for a direct expense incurred by the State even though the statute does not direct the funds collected to be used for a legitimate criminal justice purpose?

STATEMENT OF FACTS

On September 18, 2016, the trial court found the Appellant indigent and appointed him counsel for purposes of his appeal. (1 C.R. at 129-131). The cost bill, filed on September 23, 2016, eight days after the judgment was filed, assessed $200 for a "Summoning Witness/Mileage" Fee. (1 C.R. at 127, 142-182).

SUMMARY OF THE ARGUMENT

Appellant contends that the summoning witness/mileage fee statute under TEX. CODE OF CRIM. PROC. ART. 102.011(a)(3) and (b) is facially unconstitutional in violation of Separation of Powers provision of the Texas Constitution. The constitutional infirmity in this case is the summoning witness/mileage fee statute's (or an interconnected statute's) failure to direct the funds collected from indigent criminal defendants to be used in a manner that would make it a court cost (i.e., for something that is a legitimate criminal justice purpose).

The First Court of Appeals improperly "interpret[ed] *Peraza* as holding that at least two types of fees assessed as court costs are constitutionally permissible: (1) court costs to reimburse criminal justice expenses incurred in connection with that criminal prosecution and (2) court costs to be expended in the future to off-set future criminal justice costs." Based upon this interpretation of *Peraza*, the First Court of Appeals held *Salinas* did not apply to the Appellant's facial challenge to the summoning witness/mileage fee because "*Salinas* did not address reimbursement-based court costs," the fee was "an expense incurred by the State in the prosecution of this particular case[,] and [was] unquestionably for a legitimate criminal justice purpose."

However, under *Peraza*/*Salinas*, a court cost's constitutionality is measured by whether the cost is statutorily directed to be expended for criminal justice purposes regardless of whether or not the court cost is a cost to reimburse criminal justice

expenses incurred in connection with a criminal prosecution or a cost to be expended in the future to off-set future criminal justice costs. Thus, the First Court of Appeals erred by not properly applying this Court's precedents in *Peraza* and *Salinas*.

ARGUMENT

Whether the First Court of Appeals erred when it misinterpreted *Peraza v. State*, 467 S.W.3d 508 (Tex. Crim. App. 2015) and failed to apply *Salinas v. State*, 523 S.W.3d 103 (Tex. Crim. App. 2017) in determining that the summoning witness/mileage fee under Texas Code of Criminal Procedure Article 102.011 was not facially unconstitutional because the court cost was for a direct expense incurred by the State even though the statute does not direct the funds collected to be used for a legitimate criminal justice purpose?

A. Legal Background

1. Peraza v. State, 467 S.W.3d 508 (Tex. Crim. App. 2015)

In *Peraza*, the defendant challenged the $250 DNA record fee as facially unconstitutional because the DNA fee was not a court cost that was "necessary" or "incidental" to "the trial of a criminal case." *Peraza v. State*, 467 S.W.3d 508, 511 (Tex. Crim. App. 2015). In evaluating a facial challenge to the constitutionality of a court cost, a challenger assumes the burden to demonstrate that a statute "'always operates unconstitutionality in all possible circumstances.'" *Id.* at 516, quoting *State v. Rosseau*, 396 S.W.3d 550, 556 (Tex. Crim. App. 2013). "To determine whether a statute always operates unconstitutionally in all possible circumstances, [an appellate court] must look to see if there are potential applications of the statute that are constitutionally valid." *Id.*

Peraza rejected the requirement "that, in order to pass constitutional muster, the statutorily proscribed court cost must be 'necessary' or 'incidental' to the 'trial of a criminal case'" under this Court's prior precedent in *Ex parte Carson*, 159 S.W.3d 126, 130 (Tex. Crim. App. 1942) (op. on reh'g). *Peraza*, 467 S.W.3d at 517. This Court determined:

> *if the statute under which court costs are assessed (or an interconnected statute) provides for an allocation of such court costs to be expended for legitimate criminal justice purposes, then the statute allows for a constitutional application that will not render the courts tax gathers in violation of the separation of powers clause*. A criminal justice purpose is one that relates to the administration of our criminal justice system. Whether a criminal justice purpose is "legitimate" is a question to be answered on a statute-by-statute/case-by-case basis.

Id. at 517-518 (emphasis added)

In rejecting *Carson's* "necessary" or "incidental" requirement, the *Carson* test was reassessed in light of modern realities:

> The terms "necessary" and "incidental" are commonly used and easily understood words; however, we find that they are too limiting to continue to be the litmus test. In the 73 years since *Carson* was decided, the prosecution of criminal cases and our criminal justice system have greatly evolved. Our legislature has developed statutorily prescribed court costs with the intention of reimbursing the judicial system for costs incurred in the administration of the criminal justice system. To require such costs to be "necessary" or "incidental" to the trial of a criminal case in order to be constitutionally valid ignores the legitimacy of costs that, although not necessary to, or an incidental expense of, the actual trial of a criminal case, may nevertheless be directly related to the recoupment of costs of judicial resources expended in connection with the prosecution of criminal cases within our criminal justice system.

Peraza, 467 S.W.3d at 517.

The important consideration in *Peraza* was whether a court cost was directed "to be expended for legitimate criminal justice purposes." *Id.* at 517-518. Under this Court's framework in *Peraza*, a party who challenges a court cost statute as facially unconstitutional in violation of the Separation of Powers clause of the Texas Constitution must demonstrate there are no potential constitutional applications for the statute under which court costs are assessed (or an interconnected statute) that provide for an allocation of such costs to be expended for legitimate criminal justice purposes." *Id.* at 516 ("To determine whether a statute always operates unconstitutionally in all possible circumstances, [an appellate court] must look to see if there are potential applications of the statute that are constitutionally valid.") and *Id.* at 517-518 ("if the statute under which court costs are assessed (or an interconnected statute) provides for an allocation of such court costs to be expended for legitimate criminal justice purposes, then the statute allows for a constitutional application that will not render the courts tax gathers in violation of the separation of powers clause").

Utilizing the above framework, this Court determined:

> Peraza must show that Article 102.020 does not allow for any constitutionally permissible applications. Because a portion of the DNA record fee collected is deposited into the criminal justice planning account, and the criminal justice planning account is statutorily required to reimburse monies spent collecting DNA specimens from offenders charged with certain offenses (including aggravated sexual assault of a child under 14)…the statute allows for constitutionally permitted applications. The statutory scheme allocating these resources to the criminal justice planning account are required, via interconnected statutory provisions, to be expended for legitimate criminal justice

> purposes. Therefore, they do not constitute a tax and thus do not violate the separation of powers clause.

Peraza, 467 S.W.3d at 519 (internal citations omitted)

This Court also made a similar determination regarding the DNA record fee assigning revenue to the state highway fund. *Id.* at 520-521.

2. ***Salinas v. State*, 523 S.W.3d 103 (Tex. Crim. App. 2017)**

The defendant in *Salinas* challenged two accounts contained within the consolidated fee statute, TEX. LOCAL GOV'T CODE § 133.102. *Salinas v. State*, 523 S.W.3d 103, 106 (Tex. Crim. App. 2017). In discussing the standard of review for facial challenges to court cost statutes grounded upon separation of powers, this Court cited to and quoted from *Peraza*:

> The courts are delegated a power more properly attached to the executive branch if a statue turns the courts into "tax gathers," but the collection of fees in criminal cases is a part of the judicial function "if the statute under which court costs are assessed (or an interconnected statute) provides for an allocation of such costs to be expended for legitimate criminal justice purposes." What constitutes a legitimate criminal justice purpose is a question to be answered on a statute-by-statue/case-by-case basis. And the answer to that question is determined by what the governing statute says about the intended use of the funds, not whether funds are actually used for a criminal justice purpose.

Salinas, 523 S.W.3d at 107.

In *Salinas*, this Court found two court costs located within the Consolidated Court Cost fee, the "abused children's counseling" account and the "comprehensive rehabilitation" account, facially unconstitutional because they violated the separation

of powers clause and were actually taxes unrelated to criminal justice purposes. *Salinas*, 523 S.W.3d at 108-110. This Court emphasized *Peraza* in making these determinations:

> The issue is whether the fee in question is a court cost (which is allowed) or a tax (which is unconstitutional). That issue must be determined at the time the fee is *collected*, not at the time the money is spent. Accordingly, *Peraza* requires that the relevant statutes direct that the funds be used for something that is a legitimate criminal justice purpose; it is not enough that some of the funds may ultimately benefit someone who has some connection with the criminal justice system. Under the dissents' (and the State's) reasoning, a fee to be paid for children's health insurance, without any other restriction, would be "for a criminal justice purpose" because someone who is a victim of a crime might receive medical services paid for by that insurance. Or a fee for the purpose of funding college student loans that would be available to anyone would be available to anyone would be "for a criminal justice purpose" because someone who was a victim of a crime (or a convict, for that matter) could apply for such a loan. Under such a view, there would be no limits to the types of fees the legislature could require the courts to collect, and courts would effectively be tax gathers.
>
> *Because the constitutional infirmity in this case is the statute's failure to direct the funds to be used in a manner that would make it a court cost (i.e., for something that is a criminal justice purpose), the statute operates unconstitutionally on its face. The fact that some of the money collected may ultimately be spent on something that would be a legitimate criminal justice purpose if the legislature had directed its use in that fashion is not sufficient to create a constitutional application of the statute because the actual spending of the money is not what makes a fee a court cost*.

Salinas, 103 S.W.3d at 109, fn. 26 (emphasis added)

B. The First Court of Appeals Opinion

In rejecting Appellant's facial challenge to the summoning witness/mileage fee, the First Court of Appeals began by reviewing *Peraza*:

> Under *Peraza's* broader rule, a statute that requires a convicted defendant to pay court costs that are "to be expended for legitimate criminal justice purposes" in the future is constitutional even if those costs do not arise

> out of that particular defendant's prosecution and have no direct relationship to that particular type of criminal prosecution, so long as the costs are "directly related to the recoupment of costs of judicial resources expended in connection with the prosecution of criminal cases within our criminal justice system."

Allen v. State, No. 01-16-00768-CR, 2018 Tex. App. LEXIS 7216 at *15 (Tex. App.—Houston [1st Dist.] Aug. 30, 2018, pet. granted) (op. on reh'g) (designated for publication), citing *Peraza*, 467 S.W.3d at 517.

Furthermore, the First Court of Appeals believed that "[b]y concluding that the *Carson* standard was 'too limiting' and expanding the category of costs that can be properly assessed, *Peraza* suggest[ed] that a statute that requires a convicted defendant to reimburse the State for court costs that have already been 'incurred in the administration of the criminal justice system' in that prosecution remain proper and facially valid." *Allen*, 2018 Tex. App. LEXIS at *15, citing *Peraza*, 467 S.W.3d at 510, 517. Therefore, the First Court of Appeals "interpret[ed] *Peraza* as holding that at least two types of fees assessed as court costs are constitutionally permissible (1) court costs to reimburse criminal justice expenses incurred in connection with that criminal prosecution and (2) court costs to be expended in the future to off-set future criminal justice costs." *Id.* at *15-16, citing *Peraza*, 467 S.W.3d at 517-518.

When discussing *Salinas*, the First Court of Appeals stated *Salinas* "explained that whether a future allocation relates to the administration of our criminal justice system depends on 'what the governing statute says about the intended use of the funds, not whether [the] funds are actually used for a criminal justice purpose." *Id.* at "16, quoting *Salinas*, 523 S.W.3d at 107, 109 fn. 26. In addition, due to the

"comprehensive rehabilitation" account and the "abused children's counseling" account having "no connection to past incurred expenses in that particular prosecution or future criminal justice expenditures, the statute imposing the fees was held to be facially unconstitutional." *Id.*, citing *Salinas*, 523 S.W.3d at 109 fn. 26; *Toomer v. State*, No. 02-16-00058-CR, 2017 Tex. App. LEXIS 9387 at *3 (Tex. App.—Fort Worth Oct. 5, 2017, pet. ref'd) (mem. op., not designated for publication); *Casas v. State*, 524 S.W.3d 921, 927 (Tex. App.—Fort Worth 2017, no pet.); and *Peraza*, 467 S.W.3d at 517. The First Court further noted:

> *Salinas* did not involve court costs directly related to the trial of that particular case. And, while *Peraza* expanded the category of costs that would be facially constitutional and *Salinas* explained the standard for concluding that a future allocation relates to the administration of our criminal justice system, neither case, individually or collectively, explicitly address whether a court cost linked to an expense incurred in the past in the criminal prosecution of the defendant and collected to reimburse the cost of actually expended judicial resources must also be specifically directed to future use that is a criminal justice purpose…But that is the type of court cost being challenged here: a fee to recoup criminal justice expenses actually incurred during the prosecution of that particular criminal defendant.

Allen, 2018 Tex. App. LEXIS 7216 at *19.

The First Court of Appeals concluded that *Salinas* did not apply to the Appellant's facial challenge to the summoning witness/mileage fee because "*Salinas* did not address reimbursement-based court costs" and the summoning witness/mileage fee was "an expense incurred by the State in the prosecution of this particular case and is unquestionably for a legitimate criminal justice purpose":

> We conclude that *Peraza*'s reasoning is more appropriately applied to this fee because the State is not relying on how the fee will be expended in the future, but, instead, on the recoupment of actual expenses incurred as part of this case. And *Salinas* does not purport to limit or modify *Peraza*'s focus on whether the fees are incurred as a direct result of or reasonably related to the "recoupment of costs of judicial resources," which this fee unquestionably was.

Id. at *22-23, citing *Peraza*, 467 S.W.3d at 517.

Ultimately, the First Court of Appeals concluded that Article 102.011(a)(3) and (b) was not facially unconstitutional even though it acknowledged that the statute was silent as to where the fees collected would be directed. *Id.* at *22-24.

C. The summoning witness/mileage fee is facially unconstitutional as the statute (or an interconnected statute) does not direct the funds collected from indigent criminal defendants to be used for a legitimate criminal justice purpose.

1. The First Court of Appeals misinterpreted this Court's decision in *Peraza* and failed to correctly apply this Court's decision in *Salinas*.

The First Court of Appeals "interpret[ed] *Peraza* as holding that at least two types of fees assessed as court costs are constitutionally permissible: (1) court costs to reimburse criminal justice expenses incurred in connection with that criminal prosecution and (2) court costs to be expended in the future to off-set future criminal justice costs." *Allen*, 2018 Tex. App. LEXIS 7216 *15-16.[1] In essence, what the First

[1] The Fourteenth Court of Appeals in Houston recently released two opinions upholding the constitutionality of the summoning witness/mileage fee and employing similar analysis as the First Court of Appeals in *Allen*. See *Lopez v. State*, No.14-17-00205-CR, 2018 Tex. App. LEXIS 10600 (Tex. App.—Houston [14th Dist.] Dec. 20, 2018, no pet. h.) (designated for publication) and *Jackson v. State*, No. 14-17-00511-CR, 2018 Tex. App. LEXIS 10623 (Tex. App.—Houston [14th Dist.] Dec. 20, 2018, no pet. h.) (designated for publication). Both cases were decided by the same panel of the

Court of Appeals stated is that there are two legal standards for court costs, one of which applies to courts costs that serve to recoup costs that were directly incurred in connection with the Appellant's criminal prosecution and another legal standard for all other court costs. Based upon this interpretation by the First Court of Appeals, if a challenged court cost is from the first category, then the statute would not be facially unconstitutional even if the court cost statute (or an interconnected statute) contained no language directing the funds to be expended for legitimate criminal justice purpose. This interpretation formed the basis of the First Court of Appeals ruling:

> Admittedly, the statue assessing these fees, like the statue in *Salinas*, does not require that the fee be deposited into a specific account for future criminal justice expenses. But unlike the fee in *Salinas*, the "witness summoning/mileage" fee is an expense incurred by the State in the prosecution of this particular case and is unquestionably for a legitimate criminal justice purpose. The *Salinas* court refused to uphold the constitutionality of the "abuse children's counseling" fee that was not directly related to the particular criminal case on appeal from a conviction for assault of an elderly person. And, unlike the "comprehensive rehabilitation" account, which did not "not, on its face, appear to serve a legitimate criminal justice purpose," this "witness summoning/mileage" fee does.

Allen, 2018 Tex. App. LEXIS 7126 at *22.[2]

Fourteenth Court of Appeals and in both cases Chief Justice Frost issued a concurring and dissenting opinion where she expressed her opinion in both cases that "[t]he *Allen* court and the majority ha[d] misinterpreted *Peraza* and *Salinas*." *Lopez*, 2018 Tex. App. LEXIS 10600 at *39 (Frost, C.J., concurring and dissenting) and *Jackson*, 2018 Tex. App. LEXIS 10623 at *35 (Frost, C.J., concurring and dissenting).

[2] To the extent that the First Court of Appeals decision raises the implication that this Court's holding in *Ex parte Carson* still applies to so-called reimbursement court costs, Appellant again emphasizes that neither *Peraza* nor *Salinas* suggested that their holdings would apply differently

However, despite the First Court of Appeals interpretation, this Court's holding in *Peraza* was not expressed in the dichotomy pronounced by the First Court of Appeals, as this Court did not expressly divide court's costs into separate categories for purposes of determining a court cost statutes' facial constitutionality under the separation of powers provision of the Texas Constitution.

The standard in *Peraza* was written in broad terms: "*if the statute under which court costs are assessed (or an interconnected statute) provides for an allocation of such court costs to be expended for legitimate criminal justice purposes, then the statute allows for a constitutional application that will not render the courts tax gathers in violation of the separation of powers clause*." *Peraza*, 467 S.W.3d at 517-518 (emphasis added). "The *Peraza* court did not say this standard would differ depending on the type of court-cost statute under scrutiny." *Lopez v. State*, No. 14-17-00205-CR, 2018 Tex. App. LEXIS 10600 at *40 (Tex. App.—Houston [14th Dist.] Dec. 20, 2018, no pet. h.) (designated for publication) (Frost, C.J., concurring and dissenting). Two years later, *Salinas* utilized the same standard announced in *Peraza*:

> The courts are delegated a power more properly attached to the executive branch if a statue turns the courts into tax gathers, but the collection of fees in criminal cases is a part of the judicial function if the

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depending on the type of court costs at issue. Also, this Court unequivocally explained that it rejected *Carson's* requirements in *Peraza*:

> We therefore *reject Carson's* requirement that, in order to pass constitutional muster, the statutorily prescribed court cost must be "necessary" or "incidental" to the "trial of a criminal case."

Peraza, 467 S.W.3d at 517 (emphasis added).

> statute under which court costs are assessed (or an interconnected statute) provides for an allocation of such costs to be expended for legitimate criminal justice purposes.

Salinas, 523 S.W.3d at 107

In addition, on two separate occasions this Court emphasized that the court costs at issue in *Salinas* were unconstitutional because of the court costs failure to meet the standard formulated in *Peraza*. See *Salinas*, 523 S.W.3d at 109, fn. 26 ("*Peraza* requires that the relevant statutes direct that the funds be used for something that is a legitimate criminal justice purpose; it is not enough that some of the funds may ultimately benefit someone who has some connection with the criminal justice system."…"Because the constitutional infirmity in this case is the statute's failure to *direct* the funds to be used in a manner that would make it a court cost (i.e., for something that is a criminal justice purpose), the statute operates unconstitutionally every time the fee is collected, making the statute unconstitutional on its face.") and *Salinas*, 523 S.W.3d at 110, fn. 36 ("The fee is unconstitutional because the funds are not directed by statute to be used for a criminal justice purpose."). Justice Jennings noted in his dissenting opinion that the holding in *Salinas* was phrased in "broad language." *Allen*, 2018 Tex. App. LEXIS 7216 at *41 (Jennings, J., dissenting) ("Although the majority, here, would like to assert that *Salinas* is different from the instant case, it, by doing so, fails to recognize the court of criminal appeals' use of broad language in *Salinas* and the fact that the court did not limit its holding to the circumstances of the case.). This Court in *Salinas,* just like this Court in *Peraza*, did not

make any distinction between what type of court costs were at issue, i.e. whether the court cost was to reimburse criminal justice expenses incurred in connection with a criminal prosecution or were the court costs to be expended in the future to off-set future criminal justice costs.

Furthermore, the First Court of Appeals failed to consider that, since the overriding consideration is that the Courts not become tax gathers, *Salinas* must be the rule or else the government could exact money from criminal defendants ostensibly for a legitimate criminal justice purpose, but direct the money towards a non-criminal justice purpose such as the pavement of a road. Potentially, the money collected could also not be directed to any specific purpose, and thus be used for any purpose even though the money was collected under the belief of being a legitimate criminal justice purpose. The fear expressed by this Court in *Salinas* that "there would be no limits to the types of fees the legislature could require the courts to collect" would be realized under the First Court of Appeals interpretation of *Peraza*. See *Salinas*, 523 S.W.3d at 109, fn. 26. Therefore, "the directing-the-use-of-funds component is the centerpiece of the *Peraza*/*Salinas* legal standard. Eliminating it changes the standard – and potentially the outcome." *Lopez*, 2018 Tex. App. LEXIS 10600 at * 39.

Thus, under *Peraza* and *Salinas*, a court cost's constitutionality is measured by whether the cost is statutorily directed to be expended for a legitimate criminal justice purposes. This is regardless of whether the court cost is a cost to reimburse criminal

justice expenses incurred in connection with a criminal prosecution or is a court cost to be expended in the future to off-set future criminal justice costs.

"The Court of Criminal Appeals is the court of last resort in criminal matters. This being so, no other court of this state has authority to overrule or circumvent its decisions, or disobey its mandates." *State of Texas ex rel. Vance v. Clawson*, 465 S.W.2d 164, 168 (Tex. Crim. App. 1971), quoting *State of Texas ex rel. Wilson v. Briggs*, 351 S.W.2d 892, 894 (Tex. Crim. App. 1961). See also TEX. CONST. ART. V, § 5(a). ("the Court of Criminal Appeals shall have final appellate jurisdiction coextensive with the limits of the state, and its determinations shall be final, in all criminal cases…"). By deviating from the *Peraza/Salinas* standard, the First Court of Appeals used an incorrect legal standard inconsistent with this Court's prior precedent in determining the summoning witness/mileage fee survived constitutional scrutiny. This was error.

2. The summoning witness/mileage fee statute does not direct the funds collected from criminal defendants to be used for a legitimate criminal justice purpose.

Article II, Section 1, of the Texas Constitution provides:

> The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

TEX. CONST. ART. II., § 1.

"One way the separation of powers provision is violated 'is when one branch of government assumes or is delegated a power more properly attached to another branch.'" *Hernandez v. State*, No. 01-16-00755-CR, 2017 Tex. App. LEXIS 7612 *18 (Tex. App.—Houston [1st Dist.] Aug. 10, 2017, no pet. h.) (designated for publication), citing *Ex parte Lo*, 424 S.W.3d 10, 28 (Tex. Crim. App. 2013). "The courts are delegated a power more properly attached to the executive branch if a statute turns the courts into 'tax gatherers,' but the collection of fees in criminal cases is a part of the judicial function 'if the statute under which court costs are assessed (or an interconnected statute) provides for an allocation of such court costs to be expended for legitimate criminal justice purposes.'" *Id.* at *19, citing *Peraza*, 467 S.W.3d at 517.

Appellant was ordered to pay court costs that included the $200 "Summoning Witness/Mileage" cost. (1 C.R. at 127, 142-182). Texas Code of Criminal Procedure Article 102.011 provides, in pertinent part:

> (a) A defendant convicted of a felony or a misdemeanor shall pay the following fees for services performed in the case by a peace officer:
>
> . . .
>
> (3) $5 for summoning a witness…
>
> (b) In addition to fees provided by Subsection (a) of this article, a defendant required to pay fees under this article shall also pay 29 cents per mile for mileage required of an officer to perform a service listed in this subsection and to return from performing that service.

"[C]ourts are required to construe a statute in accordance with the plain meaning of its literal text unless the language of the statute is ambiguous or the plain

meaning would lead to an absurd result." *White v. State*, 61 S.W.3d 424, 428 (Tex. Crim. App. 2001), citing *Boykin v. State*, 818 S.W.2d 782 (Tex. Crim. App. 1991). "'When interpreting statutes, we look to the literal text of the statute in question and attempt 'to discern the fair, objective meaning of that text at the time of its enactment.'" *State v. Schunior*, 506 S.W.3d 29 (Tex. Crim. App. 2016), quoting *Boykin*, 818 S.W.2d at 785. "In interpreting the literal text of a statute, we must 'presume that every word in the statute has been used for a purpose and that each word, phrase, clause, and sentence should be given effect if reasonably possible.'" *Id.*, quoting *State v. Hardy*, 963 S.W.2d 516, 520 (Tex. Crim. App. 1997).

The majority opinion acknowledged that the language of the summoning witness/mileage fee statute does not direct the fees collected as court costs to any specific fund that has a legitimate criminal justice purpose. *Allen*, 2018 Tex. App. LEXIS 7126 at *22 ("Admittedly, the statue assessing these fees, like the statue in *Salinas*, does not require that the fee be deposited into a specific account for future criminal justice expenses."). While the statute does provide that "[a] defendant convicted of a felony or a misdemeanor shall pay the following fees for services performed in the case by a peace officer…$5 for summoning a witness…[and] shall also pay 29 cents per mile for mileage required of an officer to perform a service listed in this subsection and to return from performing that service," the statute does not mention that the fee is collected for the purpose of reimbursing an officer. See TEX. CODE OF CRIM. PROC. ART. 102.011(a)(3) and (b). Nor, does the summoning

witness/mileage fee statute specifically direct the funds collected under article 102.011(a)(3) and (b) be directed to be expended for the purpose of reimbursing peace officers, assuming that the actual reimbursement of peace officer would be considered a legitimate criminal justice purpose. The statute only mentions that a fee is to be collected, not what is to be done with it. Just because the statute is entitled "Fees for Services of Peace Officers" this is not enough of a reason in of itself to uphold the constitutionality of court cost statute when the statute does not direct the funds to be expended for a legitimate criminal justice purpose. *Salinas*, 523 S.W.3d at 110 ("We cannot uphold the constitutionality of funding [the abused children's counseling] account through court costs on the basis of its name or its former use when all the funds in the account go to general revenue.").

3. There are no interconnected statutory provisions providing for the allocation of the funds collected as court costs pursuant to Article 102.011 to be expended for legitimate criminal justice purposes.

The State may contend that there is an interconnected statute that provides for the allocations of the funds collected as court costs pursuant to Article 102.011(a)(3) and (b) to be expended for legitimate criminal justice purposes. In their motion for *en banc* reconsideration, the State argued that a series of Constitutional and statutory provisions enabled the fees collected pursuant to TEX. CODE OF CRIM. PROC. ART. 102.011(a)(3) and (b) to be distributed to the salary funds of the summoning officer which is a permissible use of a court cost. (State's Mot. for *en banc* reconsideration at

5-7). The State primarily relied upon sections 113.021 and 154.003 of the Local Government Code. Section 154.003 of the Local Government Code provides:

> A district, county, or precinct officer who is paid an annual salary shall charge and collect in the manner authorized by law all fees, commissions, and other compensation permitted for official services performed by the officer. The officer shall dispose of the collected money as provided by Subchapter B, Chapter 113.

TEX. LOC. GOV'T CODE § 154.003

The first sentence of Subsection (a) of Section 113.021 reads as follows:

> The fees, commissions, funds, and other money belonging to a county shall be deposited with the county treasurer by the person who collects the money.

TEX. LOC. GOV'T CODE 113.021(a).

Subsection (b), quoted in the State's motion, states:

> The county treasurer shall deposit the money in the county depository in the proper fund to the credit of the person or department collecting the money.

TEX. LOC. GOV'T CODE § 113.021(b).

The State interpreted the reference to "the proper fund" in the above statute to mean the salary fund of the officers who summoned the witness. (State's Mot. for *en banc* reconsideration at 7). See TEX. LOCAL GOV'T CODE §§ 154.023 and 154.042. As authority for this interpretation, the State cited Attorney General Opinion No. GA-0636 which says:

> Any fees, commissions, or other compensation collected by an officer who is paid on a salary basis are deposited by the treasurer in the applicable salary fund created by Local Government Chapter 154, which

> governs the compensation of district, county, and precinct officers paid on a salary basis.

TEX. ATT'Y GEN. OP. No. GA-0636 (2008) at 3.

As the State later conceded in a letter to the First Court of Appeals during the pendency of their motion for *en banc* reconsideration, at the time this Attorney General Opinion was written, Texas Local Government Code § 113.021(b) made a specific reference to a salary fund under Chapter 154 of the Local Government Code:

> The county treasurer shall deposit the money in the county depository in a special fund to the credit of the officer who collected the fee. If the money is fees, commission, or other compensation collected by an officer who is paid on a salary basis, the appropriate special fund is the applicable salary fund created under Chapter 154.

Act of May 21, 1987, 70th Leg. R.S., ch. 149 § 1, 1987 Tex. Gen. Laws 707, 832.

However, the statute was amended in 2011, removing the reference to salary funds:

> The county treasurer shall deposit the money in the county depository in the proper fund to the credit of the person or department collecting the money.

TEX. LOC. GOV'T CODE § 113.021(b).[3]

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[3] Regardless, nearly thirty years ago, the attorney general recognized that in Harris County there were no longer any salary funds:

> We are informed that the commissioners court has eliminated officers' salary funds pursuant to former V.T.C.S. article 3912e, section 19(i) (now Local Government Code section 154.007). Under this provision, the commissioners court may order that money that would otherwise be deposited in the salary fund be deposited in the general fund of the county. . . *Indeed, section 154.007(b) states that in a county where the general fund is made the source of payment of salaries, a reference in chapter 154 to a salary fund*

Although the State believed that this did not invalidate their argument, Appellant respectfully disagrees. Following the logic of the State's potential argument, without the reference to salary funds in TEX. LOC. GOV'T CODE § 113.021(b), the only avenue left as to where the fees could potentially be directed is to a "proper fund to the credit of the person or department collecting the money." Even assuming Texas Local Government Code §§ 113.021 and 154.003 somehow serve as interconnected statutes for the fees collected from TEX. CODE OF CRIM. PROC. ART. 102.011(a)(3) and (b), these interconnected statutes still are not directing the fees collected to be expended for a legitimate criminal justice purpose. Again, TEX. CODE OF CRIM. PROC. ART. 102.011 does not specifically direct the funds collected under article 102.011(a)(3) and (b) to be expended for the purpose of reimbursing peace officers. That statute only mentions that a fee is to be collected, not what is to be done with it. Similarly, while Local Government Code § 113.021(b) talks about a "proper fund to the credit of the person or department collecting the money," this is still not a specific directive to have funds directed for the purpose of reimbursing peace officers. In addition, the Local Government Code does not define the term

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> *means the general fund*. Consequently, officers in Harris County are authorized to issue warrants on the general fund in payment of employees' salaries.

TEX. ATT'Y GEN. OP. NO. JM-911 (1988) (emphasis added)

The emphasized language negates the State's contention that the summoning witness/mileage fee goes to the officers' salary funds. Rather, revenue from this fee goes to the county's general fund.

"proper fund". See TEX. LOCAL GOV'T CODE § 113.001 (term "proper fund" not included within definitional section for Chapter 113).

In essence, under the State's theory the money collected would go to some unknown fund that is credited to either a person or department, presumably the sheriff's office, but with no directive as to how the money's would be expended. The fact that the fund would presumably be for the Sherriff's office would not in of itself serve as a legitimate criminal justice purpose, especially when the statutes give no indication on how that money is directed to be spent. *Salinas*, 523 S.W.3d at 110 ("We cannot uphold the constitutionality of funding [the abused children's counseling] account through court costs on the basis of its name or its former use when all the funds in the account go to general revenue."). Also, although "some of the money may ultimately be spent on something that would be a legitimate criminal justice purpose if the legislature had directed its use in that fashion is not sufficient to create a constitutional application of the statute because the actual spending of the money is not what makes a fee a court cost." *Salinas*, 523 S.W.3d at 109, fn. 26. Thus, there are no interconnected statutes directing the funds collected from the summoning witness/mileage fee for a legitimate criminal justice purpose.

4. A report from the Office of Court Administration found that the fees collected from the summoning witness/mileage fee are directed to the general revenue funds of either the City, County, or State.

Appellant is not contending that the summoning witness/mileage fee is facially unconstitutional because of the information contained in the Office of Court

Administration's ("OCA") report. However, Appellant does believe that the OCA's report "simply illustrates the consequences of the legislature's lack of direction." See *Salinas*, 523 S.W.3d at 110, fn. 36 ("The comptroller's website simply illustrates the consequences of the legislature's lack of direction.").

The 83rd Legislature mandated that the State Office of Court Administration prepare a report on court costs. Tex. S.B. 1908, 83d Leg., R.S. (2013). The report was prepared and is available on the website for the Office of Court Administration - Study of the Necessity of Certain Court Costs and Fees in Texas As Directed by Senate Bill 1908, 83rd Legislature September 1, 2014.[4] A review of the comprehensive report details that the fees for summoning witnesses "goes to the General Fund of the County or City." See Texas Office of Court Administration, Study of the Necessity of Certain Court Coasts and Fees in Texas, September 21, 2014, at page 12 of 64 in the Criminal Court Cost section (or page 102 of the PDF) - Fee No. 26. See also *Allen*, 2018 Tex. App. LEXIS 7126 at *44-47 (Jennings, J., dissenting). "Money in a county's general fund can be spent for 'any proper county purpose.'" *Hernandez,* 2017 Tex. App. LEXIS 7612 at *19, quoting TEX. ATT'Y GEN. OP. No. JM-530, 1986 Tex. AG LEXIS 73 (1986). The Attorney General's office has also stated that "court fees that are used for general purposes are characterized as taxes." TEX. ATT'Y GEN. OP. No. JC-0158 (1999).

[4] http://www.txcourts.gov/media/495634/SB1908-Report-FINAL.pdf (last visited January 9, 2019).

D. Conclusion

By deviating from the *Peraza/Salinas* standard, the First Court of Appeals used an incorrect legal standard inconsistent with this Court's prior precedent in determining the summoning witness/mileage fee survived constitutional scrutiny. "[A]fter *Salinas*, to avoid being declared facially unconstitutional, in violation of the Separation of Powers clause of the Texas Constriction, a statute that imposes a court cost on a criminal defendant must direct "that the funds [collected pursuant to that statute] be used for something that is a legitimate criminal justice provision." *Allen*, 2018 Tex. App. LEXIS 7126 at *42 (Jennings, J., dissenting).

The summoning witness/mileage fee statute does not direct the funds collected from criminal defendants to be used for a legitimate criminal justice purpose. There are also no interconnected statutory provisions providing for the allocations of the funds collected as court costs pursuant to Article 102.011 to be expended for legitimate criminal justice purposes. The failure of TEX. CODE OF CRIM. PROC. ART. 102.011(a)(3) and (b) to do this "is what renders the statute unconstitutional." *Id.* at *45, fn. 13 (Jennings, J., dissenting). Appellant urges this Court to declare the summoning witness/mileage fee statute facially unconstitutional as it violates the Separation of Powers clause of the Texas Constitution.

PRAYER

Appellant, Ruben Lee Allen, prays for this Court to reverse the First Court of Appeals' judgment, declare the summoning witness/mileage fee facially unconstitutional in violation of the Separation of Powers clause under the Texas Constitution, and modify the trial court's judgment to delete the $200.00 fee from the bill of costs. Appellant also prays for such other relief that this Court may deem appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing *Brief on the Merits Regarding Appellant's Petition for Discretionary Review* was e-served upon the following on January 11, 2019:

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CERTIFICATE OF COMPLIANCE

In accordance with Texas Rule of Appellate Procedure 9.4, I certify that this computer-generated document complies with the typeface requirements of Rule 9.4(e). This document also complies with the type-volume limitation of Texas Rule of Appellate Procedure 9.4(i) because this petition contains 6679 words (excluding the items exempted in Rule 9.4(i)(1)).

/s/ Nicholas Mensch
Nicholas Mensch